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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

ALVIE KILLION,
Petitioner,

vs.

PENNSYLVANIA RAILROAD COMPANY, ET AL.,
Respondents.

No. 876 130

BRIEF OF RESPONDENT P. R. MALLORY COMPANY, INC., IN OPPOSITION TO PETITION FOR CERTIORARI

EDWARD J. BRADLEY,
Suite 1100—33 North LaSalle Street
Chicago, Illinois

Counsel for Respondent,
P. R. Mallory Company,
Inc.

JAMES A. DOOLEY,
Of Counsel.

The Scheffer Printing Company, FInancial 6-2694

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Opinion Below.

The opinion of the Appellate Court of Illinois appears in 336 Ill. App. at 152.

Jurisdictional Statement.

Respondent Mallory respectfully suggests that this Court lacks jurisdiction of this cause so far as this respondent is concerned for the following reasons:

1. Petitioners did not set up or specially claim in any Illinois Court any Federal right, constitutional or statutory, with respect to respondent Mallory.

2. Petitioner's sole attempt to raise a Federal question here, so far as Mallory is concerned, is his assertion that he was denied the substance of a trial by jury. Petitioner's

counsel have overlooked this Court's repeated holdings that there is no Federal constitutional right to a trial by jury in a State Court.

3. Petitioner seeks to have this Court's writ of *certiorari* directed to the Appellate Court of Illinois. That Court is not the highest court of the State in which a decision could be had. Petitioner says that the Appellate Court, not the trial court, deprived him of constitutional rights. If that be true, petitioner had an absolute right to a writ of error from the Supreme Court of Illinois under the well settled rule that where a litigant contends that he has been denied a constitutional right in the Appellate Court, writ of error from the Illinois Supreme Court is a matter of Illinois constitutional right. (See authorities cited in Argument, *post.*)

Statement of so much of the case as is material to show that the record presents no Federal Question with respect to respondent Mallory Company.

Petitioner, a Pennsylvania conductor, having sustained injuries when his leg failed to clear an oil drum on the premises of respondent Mallory Company and in dangerous proximity to a spur of track on which respondent Pennsylvania's train was operating, sued the Pennsylvania under the Federal Employers Liability Act (U.S.C.A.) and joined the Mallory Company as co-defendant, predicating his alleged cause of action against Mallory wholly on State substantive law of negligence.

A jury in the trial court returned a verdict for $10,000. Motions for a new trial and for judgment *non obstante veredicto* were denied. Judgment was entered on the verdict as to both respondents. (Tr. 67).

Illinois' Appellate Court for the First District, a State court of intermediate appellate jurisdiction, found that, as

to the Pennsylvania, there was no negligence and as to Mallory, the plaintiff was guilty of contributory negligence which under Illinois law exonerated Mallory from liability. (Tr. 1-13).

Petitioner, instead of suing out the writ of error which is appropriate and a matter of right where there is a substantial claim that an Appellate Court has deprived a litigant of a constitutional right, (See Argument, *post*) sought, *without suggesting any Federal question as to Mallory*, leave to appeal from the Illinois Supreme Court. (Tr. 1-635). The Illinois Supreme Court denied the leave to appeal thus sought. (Tr. 224 and 225).

Respondent Mallory resists petition for *certiorari* solely on the jurisdictional grounds hereafter noted and argued. Therefore, it makes no statement of the facts of the accident but refers this Court to the Illinois Appellate Court's opinion for a narrative of the nature of the case and of petitioner's substantive claims.

At no time did petitioner ever assert in any Illinois court any claim of Federal right with respect to Mallory. Respondent Mallory, relying on the rule that suggestion and preservation in the State court of a claim of Federal right is an absolute prerequisite to this Court's jurisdiction, moves this Court to dismiss this petition as to this respondent for want of a Federal question raised and preserved in the record of the State court proceedings.

Even now, the only Federal question sought to be raised as to Mallory is based upon petitioner's claim that he was denied the substance of a trial by jury as to Mallory, as well as to Pennsylvania. Petitioner's brief seems to have been written in complete ignorance of this Court's repeated holdings that there is no Federal right to a trial by jury in State courts, at least where the cause of action arises wholly under State law.

Petitioner does argue against Mallory that the Illinois Supreme Court misconceived the import of its own prior decisions so far as Mallory is concerned. We make no reply to this argument. We rest upon the axiom that this Court lacks jurisdiction to review a State court's exposition of State substantive law and will not reverse even though convinced that the State court erred in its reading of the State's constitution, statute, judicial precedents or other law.

ARGUMENT.

I.

Petitioner raised no Federal Question in any State Court as to Respondent Mallory. Nor, if there were a Federal Constitutional Question as to Mallory, is the Appellate Court the Highest Court of Illinois in which a decision might be had. He had an absolute right to a writ of error from the Illinois Supreme Court.

Nowhere in the record will there be found any invocation by petitioner of Federal law, constitutional or statutory, with respect to respondent Mallory.

Failure to assert and preserve a Federal question in the State courts is fatal to this Court's jurisdiction. *Wilson* v. *Cook*, 327 U. S. 474. *Mellon* v. *O'Neill*, 275 U. S. 12. The rule is not new. This Court so held in 1817. *Inglee* v. *Coolidge*, 15 U. S. 363.

Of course, petitioner was not bound to assert any constitutional question in the trial court, since he prevailed in that court on every issue. But when the Appellate Court reversed the trial court, if its action raised a substantial constitutional question, petitioner's course was clear under the applicable Illinois law. Where a litigant prevails in the trial court but conceives that he has been denied a constitutional right by the Appellate Court, he has, if the question is substantial, an absolute right to a writ of error from the Supreme Court of Illinois to review the Appellate Court's judgment. *Hallberg* v. *Goldblatt Bros.*, 363 Ill. 25, is a leading case expository of this rule.

Petitioner did not sue out such a writ of error. Instead, he filed a petition for leave to appeal. *In this petition he*

nowhere mentions any constitutional rights as to either respondent. He does not maintain any claim of Federal right of any kind as to Mallory.

There is no Federal question appropriately asserted and properly preserved as to Mallory. Hence this Court lacks jurisdiction to review, certainly as to Mallory.

II.

Petitioner's only Federal Claim here as to Mallory is his contention that he was denied his "Constitutional right to a trial by jury." But the Federal Constitution guarantees no such right in State Courts. Therefore, there is no basis for Claim of Federal Right.

Petitioner's counsel assumes, as do many lawyers, that denial of the right to trial by jury in a State court violates either the Sixth or the Fourteenth amendment.

But this, of course, is simply not so.

There is no Federal constitutional right to a trial by jury in a State court. *Maxwell* v. *Dow,* 176 U. S. 581. This is the rule even in a capital case. *Frank* v. *Magnum,* 237 U. S. 309. And there is no violation of Federal constitutional rights even where this court can perceive that a trial by jury was denied in violation of State constitutional provisions. *Iowa Central R.R.* v. *Iowa,* 160 U. S. 392.

Since Illinois need not grant a trial by jury at all, so far as this Court is concerned, *a fortiori* it may partition the function of drawing inferences, conclusions and the like between juries and reviewing Courts in any manner that it sees fit.

In any event, no Federal question was raised with respect to Mallory. (See Point I, *ante.*)

III.

Petitioner's other Criticisms of the Appellate Court's opinion raise only questions of State Law.

Petitioner collates and compares Illinois decisions earlier than the decision in the instant case to sustain an argument that the Illinois courts have not decided petitioner's case in accordance with the Illinois law of negligence and contributory negligence.

Of course, this argument raises only questions of State law. Such questions are not reviewable here. This is true, *inter alia,* where it is contended that the State Court misapplied State decisions that, properly applied, would have required a contrary result. *Brinkerhoff Trust Co.* v. *Hill,* 281 U. S. 673.

IV.

The Judgment is severable as between Pennsylvania and Mallory. There being no Federal question as to Mallory, Certiorari should not be granted as to it.

So far as Mallory is concerned, this case presents no question of which this Court has jurisdiction. As we have pointed out, the only alleged Federal question as to Mallory is suggested by petitioner's contention that Illinois has deprived him of the substance of trial by jury. But there is no Federally guaranteed right to a trial by jury in a State court (Point II, *ante*) and in any event no Federal right as to Mallory was claimed in any Illinois court. (Point I, *ante*).

Where the questions presented by several parties are severable, as they are in this case, this reversal as to one does not require reversal as to the other, nor does jurisdiction as to the one party impart jurisdiction as to the

other party. *James Dickenson Farm Mortgage Co.* v. *Harry,* 273 U. S. 119.

CONCLUSION.

We respectfully submit that for the reasons stated in the brief, the petition for *certiorari* should be dismissed as to respondent Mallory.

Respectfully submitted,

EDWARD J. BRADLEY,
Suite 1100-33 North LaSalle Street
Chicago, Illinois
Counsel for Respondent,
P. R. Mallory Company,
Inc.

JAMES A. DOOLEY,
Of Counsel